IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Income Tax Appeal No. 71 of 2007

1. The Commissioner of Income-tax,
   Dehradun.
2. Asstt. Commissioner of Income-tax (OSD)
   Circle –1, Dehradun.

...……. Appellants

Versus

M/s RBF Rig Corporation
C/o Nangia & Company, C.A.,
75/7, Rajpur Road, Dehradun.

...……. Respondent

Mr. Arvind Vashisth, Standing Counsel for the appellants.
Mr. S.K. Posti, Advocate for the respondent.

Coram : Hon'ble Prafulla C. Pant, J.
Hon'ble B. S. Verma, J.

Hon. Prafulla C. Pant, J. (oral)

This appeal, preferred under Section 260-A of the Income Tax Act, 1961 (hereinafter referred as the Act) is directed against the order dated 12th of October, 2006, passed by the Income Tax Appellate Tribunal, Delhi Bench 'G', New Delhi (hereinafter referred as ITAT), whereby Income Tax Appeal No. 4758 / Del / 2005 (Assessment Year 2003-04), filed by the revenue, is dismissed.

2) The question of law involved in this appeal, is as under:

> ***Whether, the ITAT has erred in law in holding that reimbursement of expenses on account of catering charges and fuel etc. to the assessee were not part of the gross receipts for the purposes of Section 44BB of the Income Tax Act, 1961?***

3) Heard learned counsel for the parties.

4) Brief facts giving rise to this appeal are that assessee, a non-resident company, is incorporated in U.S.A. For the Assessment Year 2003-04, the assessee filed its return of income on 28.11.2003, showing total income at Rs. 6,17,89,710/-. Said return was processed under Section 143 of the Act. After issuing notices under Section 143(2) of the Act, the Assessing Officer included reimbursement of expenses shown on account of catering charges (Rs. 16,84,341/-) and expenses of reimbursement on account of fuel etc. (Rs. 35,70,877/-) towards the gross receipts, and 10 per cent tax was charged under Section 44BB of the Act. Aggrieved by said order dated 22.03.2005, the assessee / respondent preferred appeal before the Commissioner of Income Tax (Appeals) [for brevity CIT(A)], which was allowed by said authority vide its order dated 11.10.2005, passed in Appeal No. 084 / DDN / 2005, and the amount received by the assessee towards expenses of

catering charges and fuel etc. were deleted from the gross receipts. Thereafter, the Revenue filed Income Tax Appeal No. 4758 / Del / 2005 before the ITAT, which passed the impugned order dated 12th of October 2006, and affirmed the order passed by the CIT(A). Hence, this appeal by the Revenue.

5) Before further discussion, we think it just and proper to quote the provisions contained in Section 44BB of the Income Tax Act, 1961, which reads as under:

> ***"****44BB. (1) Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee [being a non-resident] engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils, a sum equal to ten per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession":*
>
> ***Provided*** *that this sub-section shall apply in a case where the provisions of section 42 or section 44D or section 115A or section 293A apply for the purposes of computing profits or gains or any other income referred to in those sections.*
>
> *(2) the amounts referred to in sub-section (1) shall be the following, namely :-*

(a) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India; and

(b) the amount received or deemed to be received in India by or on behalf of the assessee on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils outside India.

[(3) Notwithstanding anything contained in sub-section (1), an assessee may claim lower profits and gains than the profits and gains specified in that sub-section, if he keeps and maintains such books of account and other documents as required under sub-section (2) of section 44AA and gets his accounts audited and furnishes a report of such audit as required under section 44AB, and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee

under sub-section (3) of section 143 and determine the sum payable by, or refundable to, the assessee.]

Explanation. –*For the purposes of this section,-*

(i) "plant" includes ships, aircraft, vehicles, drilling units, scientific apparatus and equipment, used for the purposes of the said business;

(ii) *"mineral oil" includes petroleum and natural gas.]*

6) The above quoted section makes a special provision for computing profits and gains by the non-resident assessees engaged in the business of exploration etc. of mineral oils. Sub-Section (1) provides that in respect of such assessees notwithstanding anything contained in Section 28 to 41 and Section 43 to 43A of the Act, an assessee shall be deemed to have earned ten per cent profits on the amount mentioned in sub-section (2), received by him. The amount mentioned in sub-section (2), as quoted above, clearly shows that the amount paid to the assessee on account of provision of services and facilities in connection with the extraction or production of mineral oils, whether paid in or outside India, are to be included. The words used in the section, in our opinion, include the amount received by the assessee on account of catering charges and fuel etc. to the non-resident assessee involved in the business of oil exploration, as the catering charges do form part of 'services and facilities' in connection with the extraction or production of the mineral oil.

7) A Division Bench of this Court in ***Commissioner of Income Tax and another Vs. Halliburton Offshore Services Inc. (2008) 300 ITR 265***, has held that the amount paid or received refers to all the payment to the assessee or payable to the assessee for the purposes mentioned in this section. In our opinion also the catering charges and fuel expenses reimbursed cannot be excluded from the 'amount' defined in sub-section (2) of Section 44BB of the Act. That being so, we are of the opinion that the ITAT and CIT(A) have erred in law in holding that the catering charges are liable to be excluded from the amount for the purpose of calculating the ten per cent deemed profit.

Accordingly, the substantial question of law stands answered.

8) For the reasons, as discussed above, this appeal is allowed. The impugned order passed by the ITAT and the order passed by the CIT(A), are set aside to the extent they have held that the reimbursed catering charges and one on account of fuel etc. from the amount received by the assessee, are liable to be excluded. Accordingly, the order of Assessing Officer is restored on the above count.

(B.S. Verma, J.) **(Prafulla C. Pant, J.)**

Dt. May 22, 2009.
H. Negi